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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 188

W. J. DILLNER TRANSFER COMPANY, et al.
Appellants,

v.

UNITED STATES OF AMERICA et al.
Appellees

On Appeal From the U. S. District Court for the Western District of Pennsylvania.

APPELLANTS' REPLY TO MOTIONS TO AFFIRM

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This is in reply to three separate motions to affirm but in the interest of brevity we shall follow the most recent motion filed, by the Solicitor General. All three motions follow the same form and it is unnecessary to discuss each one separately. Before taking up the points of argument, attention is directed to a new and very helpful decision. Since filing the Jurisdictional Statement, appellants' counsel has learned of a recent decision by a three judge court in the Northern District of California, dealing with one of the questions involved in the case at bar. It is quite obvious that the case at bar should have been reversed and remanded as was done in the cited case. Annexed hereto is appendix "A"; a verbatim copy of the above mentioned decision in Civil Action 39237 U. S. District Court, N.D. of California, Southern Division.

STATEMENT IN REPLY

The statements made on Pages 1 and 2 of the Solicitor General's motion to dismiss are substantially correct except that the scope of the investigation is improperly stated at the top of Page 2. A correct statement of the scope of the investigation will be found on Page 4 of the same document, and also in the first paragraph of the order marked Appendix "C" (P. 73JS.) The statements made on Pages 3 and 4 are substantially correct except that the footnote on Page 4 is quite erroneous. The provisions of the Administrative Procedure Act are applicable to proceedings before the Interstate Commerce Commission. The statements on Page 5 are substantially correct except to the extent that the conclusions expressed are in error.

Appellant Dillner is a motor common carrier of malt beverages, household goods, heavy machinery, and commodities which because of weight and size require special equipment and also such commodities as because of their weight or size require special equipment. There is no language in its certificate such as "heavy hauler" or "rigger" (See Exhibit A-1, annexed to the Original Complaint, Document 1). The classification decision cited at 2 M.C.C. 703 does not contain the phrase "heavy hauler". The statements on Pages 6 and 7 are substantially correct. On Page 8 the conclusion reached by the Solicitor General is entirely erroneous.

ARGUMENT IN REPLY

In the case at bar appellant Dillner repeatedly urged its original "grandfather" rights but the Commission ignored such requests. Annexed hereto as, appendix "B" is a copy of the original "grandfather" order dated September 14, 1942. Even a casual comparison of the language of the last paragraph of this certificate:

> *Heavy Machinery,* and *such commodities which, because of their weight and size, require special equipment.*
>
> Between points and places in Allegheny County, on the one hand, and, on the other, points and places in West Virginia, Ohio, and New York.

with the first paragraph of the order made by the Commission in M.C.C. 1766, February 7, 1955 (P. 73-Jurs. St.) confirms that the Commission deliberately restricted its investigation to the context of a subsequent certificate and in disregard of Dillner's "grandfather" rights. (P. 15 J.S.) The Examiner recognized this existing authority in his report.

Thus we have a situation wherein the Commission failed and refused to perform its functions and even refused to discuss the issue in the Court below. (P. 24, J.S.) The Commission's investigation was so limited at its inception, as to exclude consideration of the "grandfather" rights. (P. 39 J.S.) (P. 19 J.S.)

The Commission is bound by law to consider all of Dillner certificated authority regardless of whether it be called "grandfather" or not; and this the Commission has not done.

Firebrick

The Commission declared its attitude regarding the transportation requirements of firebrick on October 21, 1939, prior to the date when Dillner accepted its first certificate. In a well reasoned opinion the Commission in *Central Territory Motor Carrier Rate,* 19 M.C.C. 545-600, recognized that firebrick, are moved in special motor equipment and are not ordinarily transported by Motor Carriers of general commodities. See annexed Appendix "C". Similar findings were made with regard to iron and steel in the same proceeding at, 23 M.C.C. 435; the Commission said in clear language, on May 27, 1940 that articles of iron and steel in truck load shipments of 20,000 lbs. or more, required special equipment to transport. Do better roads and bigger trucks work to modify operating certificates, legally, after a lapse of 25 years?

Confusion of Both Shippers and Carriers

It is clear beyond doubt that the Commission has not considered or determined the full operating scope of all of appellants' authority. (See Ex. A-1 annexed to Original Complaint, Doc. 1). Surely that unadjudicated portion includes structural steel regardless of size or weight of the shipments, and fire brick. And what is structural steel? The Commission has said in many prior decisions that channels, bars, rods, and etc. are structural steel. *App. Carroll Trucking Company,* 63 M.C.C. 348-351. Thus appellant is now ordered to cease and desist from hauling structural steel and other items for which it has clear authority. The complaints which did attack the "grandfather" authority were dismissed, by the Commission. It is clear that the District Court

misconceived its duty in denying relief under the Administrative Procedure provisions of the law, in the case at bar. In oral argument, the court agreed with appellants' counsel on nearly all questions, but upon decision the Court indicates that while the sympathy of the court is still with us, the law does not permit them to disturb the decision of the Commission even though it may be wrong. This is error, which destroys the heart of our legal process. (See Appendix "D" annexed hereto.)

Counsel respectfully refers to Senate Document 248-79th Congress, 2nd Session, entitled Administrative Procedure Act, Page 216-217. Congress intended "diligent enforcement by reviewing courts." Debates in both houses also indicate that the burden of proof was meant to be imposed upon the agencies in cases of this type. In conclusion attention of the Court is directed to the fact that the Commission's decision did not even mention that Appellant had sought to obtain review of its complete authority; the only notice taken was in the Order rejecting it. (Appendix C, page 74 J.S.)

The decisions of the Court below and the Commission are honeycombed with conflicts of law and questions of weak and contrary evidence.

IS THE ISSUE OF "GRANDFATHER" RIGHTS MATERIAL?

Surely this case will never be settled finally or fairly unless and until all of Dillners operating rights are ajudicated.

The Commission accepted the evidence of such rights upon stipulation of facts at the opening of the

first hearing. If proper consideration had been accorded to such evidence the Commission could and should have held that the words "Heavy Machinery" were and are a catch phrase denoting a certain group of articles and commodities and, that any and all other cargoes of similar nature are included "ejusdem generis", just as was done in *App. Hutchinson Transp. Co.*, 19 MC 437. See appendix D annexed hereto. Firebrick is a building material. Opposing Counsel do not dispute the existence of the prior rights, but they contend that such rights are not material to the issues here involved.

Appellants Counsel cannot predict with certainty what connotation the Commission may now attribute to the words "Heavy Machinery" but it is essential that every word be given effect to produce a "rational basis" of interpretation.

There can be no peace until justice is done. The Courts are not empowered to perform administrative functions for the Commission but they are authorized and directed to compel action by the Commission.

Summary

The Commission had no "bundling rule" when Dillner's first Certificate was issued. Indeed there is no official "building rule", yet; nor any mention of such theory prior to 1956. The term "heavy-hauler" had not been coined and the so-called general commodity haulers, did not haul steel or firebrick prior to 1942. There has been a concerted effort here to impose the recently conceived "bundling rule" upon the original "heavy machinery" authority involved herein, without benefit of decision or report by the Commission.

(P. 62., J.S.). Dillner is entitled to a fair and complete determination of all its rights. The Examiner's report is so involved here that it must be read with the decisions of the Court below and the Commission; the Commission was far from truth and justice when it reduced the density of cold rolled steel from 480 lbs per cubic foot down to about 48 lbs; according to his comments concerning sizes and weights, the Examiner thought that a steel bar three inches square and fifty feet long would weigh only 50 lbs, and a steel plate thirty feet long, eight feet wide and two inches thick would weigh only 2,000 lbs. A little arithmetic establishes the above bar weight at 5000 lbs. and of the plate at 20,000 lbs. Physical facts cannot be altered even by the Commission. All of the testimony on the subject of sizes and weights came from the opposition witnesses and related to the articles hauled by them, not by Dillner. (P. 40 & 41. J.S.) There is no specific or probative evidence against Dillner. The articles involved in the case at bar are all of varying sizes and weights, even firebrick.

Justice requires that the instant Order of the District Court be reversed and remanded with appropriate instructions to correct its errors.

Respectfully submitted,

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Dated Aug. 23rd 1961

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant,
and
INTERSTATE COMMERCE COMMISSION,
Intervening Defendant.

Civil Action No. 39237

Before: HON. GILBERT H. JERTBERG
U.S. Circuit Judge
HON. LOUIS E. GOODMAN, Chief Judge
U.S. District Judge
HON. LLOYD H. BURKE
U.S. District Judge

Per Curiam and Order

Plaintiff holds so-called "grandfather" certificates issued by respondent Commission on November 26, 1947 and September 7, 1943 authorizing the transportation of "general commodities, except liquid petroleum products in bulk, in tank trucks", over specified routes.

On July 31, 1957 plaintiff sought from the respondent Commission an order for clarification of its present authority to transport petroleum based *chemicals* in tank vehicles over its authorized routes. The clarification sought was a determination that petro-chemicals are *not* "Petroleum products". Plaintiff had been transporting

petroleum chemicals under the claimed authority of its certificates. The application of July 31, 1957 sought to resolve doubts as to whether the plaintiff's transportation of petroleum chemicals was lawful under the certificates.

Upon the hearing of this application plaintiff offered evidence to support its claimed right to transport such chemicals on the ground that they were not considered by the parties to be "petroleum products" at the time of the issuance of the "grandfather" certificates. The Commission rejected this evidence upon the ground that it was immaterial on the question of clarification tendered but that it would be material if modification or amendment of the original certificates were sought. The Commission denied plaintiff's application but its finding was "without prejudice to the filing of a petition for modification of the 'grandfather' certificates".

The record shows that the Commission has not since its decision (July 27, 1959) issued any order requiring plaintiff to desist and refrain from the transportation of the chemicals.

We now have before us a petition of the plaintiff for interlocutory and permanent injunction, and for a decree setting aside and annulling the Commission's order of July 27, 1959.

We are of the opinion that the order of the Commission under attack is not such an order as is reviewable by this Court in the present state of the record. The Commission has not, nor does it threaten to issue a desist order against plaintiff. Its decision specifically leaves the door open for further proceedings by plaintiff to obtain relief in a proceeding to modify the "grandfather"

certificates. Thus there is no irreparable injury presently threatened which bespeaks the Court's equitable jurisdiction. Plaintiff has not yet exhausted the clear administrative remedy still open to it. *Nelson v. United States*, 355 U.S. 554; *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499.

For its guidance, it is our view that the Commission should admit the rejected evidence before making any order respecting the authority of plaintiff under its certificates.

The petition is dismissed.

Dated: March 6th, 1961.

GILBERT H. JERTBERG
United States Circuit Judge

LOUIS E. GOODMAN
United States District Judge

LLOYD H. BURKE
United States District Judge

APPENDIX B

Certificate of Public Convenience and Necessity

NO. MC 21623

JOHN H. DILLNER and ALBERT G. DILLNER, a Partnership, Doing Business as W. J. DILLNER TRANSFER & STORAGE COMPANY, Pittsburgh, Pennsylvania

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th day of September, A. D., 1942.

AFTER DUE INVESTIGATION, it appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foregn commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Malt Beverages,

From Pittsburgh, Pa., to points and places in that part of West Virginia on and north of U. S.

Highway 33, and those in that part of Ohio on and east of U. S. Highway 21, and

Empty containers for malt beverages,

From the above-specified destination points to Pittsburgh, Pa.

Household goods, as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

Between points and places in Allegheny, Westmoreland, Fayette, Washington, and Beaver Counties, Pa., on the one hand, and on the other, points and places in Illinois, Maryland, Michigan, New Jersey, New York, Ohio, Virginia, West Virginia, and the District of Columbia.

Heavy Machinery, and *such commodities which, because of their weight and size, require special equipment,*

Between points and places in Allegheny County, on the one hand, and, on the other, points and places in West Virginia, Ohio, and New York.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonable continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL
Secretary

(SEAL)

APPENDIX C

Central Territory Rates 19 MCC 600

Hunter Builder's Supply Company, of Streator, Ill., a subsidiary of the Hunter Lumber Company, asks exemption of rates on clay products, namely, common or face brick, drain tile, septic tanks, chimney firebrick, barium sewer pipe, flue-lining firebrick, wall coping, and fire clay, from the requirements of the orders previously entered herein. The exemption is sought only insofar as it would affect the rates charged by petitioner between points in La Salle and Livingston Counties, Ill., on the one hand, and sections of Iowa and Indiana, on the other.

Petitioner is operating as both a common carrier and a contract carrier. Its status under the provisions of the act has not yet been finally determined.

The reasons advanced for the exemption requested are (1) that the commodities described are transported in special equipment with long base and low sides and are such as are not ordinarily transported by common carriers of general commodities, (2) that the only rates prescribed for application on any of the commodities are the sixth-class rates, minimum 20,000 pounds, and (3) that deliveries of the commodities are usually made to construction sites, many of which are not located on State or Federal highways, and it is difficult to determine and observe the rates prescribed as minimum.

The request to exclude firebrick and related commodities was granted.

APPENDIX D

Application of Hutchinson Transp. Co. 19 MCC 437

Next most important are a number of commodities which are so related in use and handling that they should be considered together as a class. They are machinery, mining and contractors' supplies and equipment, steel, lumber, cement, pipe, acids, chemicals, and other building supplies. Applicant, as stated, is especially equipped for the handling of extremely heavy machinery and other commodities to or from remote or off-route construction jobs or places of use and has specialized in this type of service.

This application was granted by the Commission.